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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA

8 GUSTAVE WILLIAM LINK, a disabled Pile Drivers
9 Local 34 Union member,

10 Plaintiff,

11 v.

12 DAVID RHODES, President, Pile Drivers Local 34
13 Union; PAT KARINEN, Secretary, Pile Drivers Local
14 34 Union; JIMMY JOHANSEN, Business Agt., Pile
15 Drivers Local 34 Union; DAN MURRAY, Recording
16 Sec., Pile Drivers Local 34 Union; STEVE TILTON,
17 Vice-President, Pile Drivers Local 34 Union; TERRY
18 CALLAN, District Coordinator, Pile Drivers Local 34
19 Apprenticeship Training; JOHN BULLOCK,
20 Executive Dir., Carpenters Training Committee for
Northern California Appeals Committee; ROBERT
ALVARADO, Executive Officer, Northern California
Carpenters Regional Council (NCCRC); DOUGLAS
McCARRON, President, United Brothers of
Carpenters (Washington D.C.); SANDRA RAE
BENSON, Union Attorney; LAW FIRM WEINBERG,
ROGER & ROSENFELD; and JOHN DOE,

21 Defendants.

22 /

23 MEMORANDUM & ORDER
24 **Re: Defendants' Motion to Dismiss**

25 Plaintiff Gustave William Link filed this action against Pile Drivers Local Union No. 34,
26 Northern California Carpenters Regional Council (NCCRC), Northern California Carpenters, AFT,
27 LLC, Apprenticeship Training Committee for Northern California (collectively, "the entity
defendants"), David Rhodes, Pat Karinen, Jimmy Johansen (collectively, "the union defendants"),
Terry Callan, John Bullock, Robert Alvarado (collectively, "the committee defendants"), and union
attorney Sandra Rae Benson, seeking damages arising out of defendants' alleged retaliation against

1 plaintiff for publicly criticizing local union officials for their failure to adequately represent the
2 interests of union members. Now before the court is defendants' motion to dismiss plaintiff's
3 amended complaint for failure to state a claim on which relief can be granted, insufficient process,
4 insufficient service of process, and failure to comply with a court order. Having considered the
5 parties' arguments and submissions, and for the reasons set forth below, the court enters the
6 following memorandum and order.

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8 BACKGROUND

9 Link was a member of the Pile Drivers Local 34 Union. Am. Compl. ¶ 1. He received
10 training as a pile driver through the Carpenters Training Committee for Northern California
11 ("training committee"), a joint labor-management sponsored apprenticeship training program. Id.
12 As an apprentice pile driver and member of the local union, Link was employed by KFM Joint
13 Venture ("KFM") to perform construction work on the San Francisco Bay Bridge Project. Id.

14 Link claims that he was subjected to excessive levels of manganese while working on the
15 San Francisco Bay Bridge Project, leading to medical problems. See Id. ¶ 2, Exh. D. Plaintiff
16 alleges that NCCRC, under the direction of NCCRC Chief Officer Alvarado and union president
17 Rhodes, negotiated a "secret oral partnership agreement" with KFM and Cal-OSHA whereby the
18 union and Cal-OSHA would not process safety complaints or grievances against KFM. Id. Due to
19 the allegedly unsafe working conditions at the Bay Bridge Project and the failure on the part of the
20 union to file safety complaints, plaintiff began to criticize union officials at local union meetings in
21 2004. Id. ¶ 4. Link also contacted the FBI and the Oakland Tribune about the alleged refusal of
22 union officials to address the safety complaints filed by union members with Cal-OSHA. See Id.
23 Exh. E. Additionally, plaintiff filed a "Constitutional Complaint" against Rhodes which plaintiff
24 alleges Rhodes threw out, failed to process, and "blackmailed" plaintiff into dropping. Id. ¶¶ 4 & 8.
25 Plaintiff also wrote numerous letters to union officials requesting information about the oral
26 partnership agreement. Id. The union, through attorney Benson, denied that any such agreement
27 existed. Id.

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1 Due to the manganese exposure, plaintiff was unable to attend the final class of his
2 apprenticeship training program without securing a medical release. Id. ¶ 6. Plaintiff never secured
3 the required release, and was therefore terminated from the apprenticeship program in July 2005. Id.
4 ¶¶ 6 & 7, Exh. B. Plaintiff alleges that this termination was the result of a conspiracy among union
5 and NCCRC officials to retaliate against plaintiff for his criticism of union officials. Id. ¶¶ 6-8.
6 Plaintiff further alleges that defendant Rhodes threatened to attack him at a January 2005 union
7 meeting in an attempt to censor plaintiff's criticisms. Id. ¶ 8.

8 On January 20, 2006, plaintiff filed this lawsuit, alleging constitutional violations, disability
9 discrimination, violations of the Labor-Management Relations Act, violations of the Labor
10 Management Reporting and Disclosure Act, breach of fiduciary duty, breach of union contract, legal
11 malpractice, violations of the California Labor Code, negligence and conspiracy. Defendants moved
12 to dismiss Link's complaint on May 8, 2006. This court granted defendants' motion with leave to
13 amend on May 17, 2006. See Link v. Rhodes, No. C 06-0386, 2006 WL 1348424 (N.D. Cal. May
14 17, 2006) (Patel, J.). Plaintiff filed an amended complaint on July 5, 2006, once again alleging
15 constitutional violations, violations of the Labor Management Reporting and Disclosure Act
16 ("LMRDA"), violations of the Americans with Disabilities Act ("ADA"), and violations of the
17 Racketeering Influenced and Corrupt Organizations Act ("RICO Act") and Hobbs Act. Defendants
18 now move to dismiss plaintiff's amended complaint in its entirety.

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20 **LEGAL STANDARD**

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22 I. **Rule 12(b)(6)**

23 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal
24 sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule
25 12(b)(6) focuses on the "sufficiency" of a claim—and not the claim's substantive merits—"a court
26 may [typically] look only at the face of the complaint to decide a motion to dismiss." Van Buskirk
27 v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Although the court is generally

1 confined to consideration of the allegations in the pleadings, when the complaint is accompanied by
2 attached documents, such documents are deemed part of the complaint and may be considered in
3 evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,
4 1267 (9th Cir.), cert. denied, 484 U.S. 944 (1987).

5 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted if “it
6 appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which
7 would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45–46 (1957). Dismissal can be based
8 on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
9 legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of
10 material fact are taken as true and construed in the light most favorable to the nonmoving party.
11 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however,
12 accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or
13 unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001);
14 Clegg v. Cult Awareness Network, 18 F.3d 752, 754–55 (9th Cir. 1994).

15 In the case of a pro se plaintiff, the court is to construe the complaint with even greater
16 liberality than it would formally drafted pleadings. Hughes v. Rowe, 449 U.S. 5, 9 (1980).

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18 II. Rules 12(b)(4) and 12(b)(5)

19 Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5) allow for dismissal based on
20 insufficient process and insufficient service of process, respectively. A Rule 12(b)(4) challenge
21 attacks the form of the summons and is generally brought on the theory that “the summons does not
22 properly contain the names of the parties.” Crane v. Battelle, 127 F.R.D. 174, 177 (S.D. Cal. 1989).
23 “Defects in the form of summons are considered technical and a dismissal is not proper unless the
24 party can demonstrate actual prejudice.” Id.

25 A Rule 12(b)(5) challenge concerns not the form of the summons, but the service of the
26 summons on defendants. A defendant must be served with a summons and a copy of the complaint
27 within 120 days of the filing of the complaint. FED. R. CIV. P. 4(m); see also Jimenez v. City of San

1 Bernardino, No. 98-55865, 1999 WL 278181, at *1 (9th Cir. Apr. 12, 1999) (holding that dismissal
2 was improper where the 120-day period had not yet expired). The failure to serve a party within the
3 120-day period may justify dismissal pursuant to Rule 12(b)(5). See English v. Krubsack, 371 F.
4 Supp. 2d 1198, 1201 (E.D. Cal. 2005).

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6 III. Rule 41(b)

7 Federal Rule of Civil Procedure 41(b) allows for the dismissal of an action for failure of a
8 plaintiff to comply with a court order. In determining whether to dismiss a case for failure to
9 comply with a court order, the courts consider the following five factors: “(1) the public’s interest in
10 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
11 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and
12 (5) the availability of less drastic alternatives.” Ferdik v. Bonzelet, 963 F.2d 1258, 1260–1261 (9th
13 Cir. 1992). The court need not make explicit findings regarding each factor. Id. at 1261.

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16 DISCUSSION

17 I. Labor Management Reporting and Disclosure Act

18 Plaintiff claims that all defendants violated his rights under the Labor Management
19 Reporting and Disclosure Act (LMRDA) by retaliating against him for exercising his free speech
20 rights. Specifically, Link alleges that defendants conspired to terminate him from the apprenticeship
21 program because plaintiff criticized the union leadership for not filing NLRB complaints against
22 KFM. Plaintiff further alleges that the committee defendants violated his rights under the LMRDA
23 by denying plaintiff the right to cross-examine witnesses. Plaintiff faults these defendants with
24 denying him the opportunity to question committee members who made the decision to terminate
25 him from the apprenticeship program.

26 As a preliminary matter, defendants claim that plaintiff’s LMRDA claims must be dismissed
27 because plaintiff did not secure leave from this court to assert LMRDA claims. While the portions
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1 of this court's prior order addressing leave to amend discussed only plaintiff's LMRA and ADA
2 claims ([Link](#), 2006 WL 1348424 at *11), the portions addressing plaintiff's LMRDA claims
3 dismissed those claims without prejudice as to the union defendants and committee defendants. Id.
4 at *7-*8. The order therefore implies that plaintiff was free to amend his LMRDA claims as well.

5 Regardless of whether plaintiff was granted leave to amend his LMRDA claims, however,
6 plaintiff has failed to cure the defects regarding these claims. This court dismissed plaintiff's
7 LMRDA claims against the union defendants for failure to plead that plaintiff had exhausted
8 intraunion remedies, or that pursuing such remedies would be inadequate or futile. Id. at *7. This
9 exhaustion requirement applies to claims against union officials as well as unions themselves. See
10 [Kinney v. Int'l Brotherhood of Elec. Workers](#), 669 F.2d 1222, 1226 (9th Cir. 1981) (dismissing
11 claim against union and union officials for failure to exhaust intraunion remedies). Plaintiff's
12 amended complaint contains no new allegations regarding exhaustion of intraunion remedies. Based
13 on plaintiff's representations to this court during and following oral argument, it appears that
14 plaintiff has not exhausted his intraunion remedies and does not intend to do so. Plaintiff has
15 therefore failed to plead causes of action under the LMRDA against the entity defendants and union
16 defendants.

17 Regarding plaintiff's LMRDA claims against the committee defendants, this court previously
18 dismissed the claims against these defendants because plaintiff had not alleged or established that
19 the committees are "labor organizations" within the meaning of the LMRDA, or that the committees
20 are "alter egos" of the union. [Link](#), 2006 WL 1348424 at *8. Plaintiff's amended complaint
21 likewise contains no new allegations regarding the labor organization status of the committees, and
22 these claims are therefore dismissed.

23 Finally, this court dismissed plaintiff's LMRDA claims against Benson, the union's attorney,
24 because the LMRDA applies only to labor organizations and their officers and agents. Id. at *8.
25 Plaintiff does not allege any significant new facts regarding Benson, and cites no authority holding
26 that the LMRDA is applicable against union attorneys. Plaintiff's LMRDA claims against Benson
27 are dismissed.

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1 II. Americans With Disabilities Act

2 Plaintiff appears to claim that defendants Bullock and Callan violated his rights under the
3 Americans With Disabilities Act by terminating him from the apprenticeship program due to his
4 medical condition. Specifically, plaintiff claims that defendants refused to allow him to complete
5 the apprenticeship program before securing a medical release from his doctor. Plaintiff did not
6 secure such a release, nor does he allege that he made any attempt to do so. This court previously
7 held that ADA claims may not be brought against individual defendants, and dismissed plaintiff's
8 claims against the individual defendants with prejudice. Id. at *5. Plaintiff's renewed ADA claims
9 against defendants Bullock and Callan are therefore improper.

10 After oral argument on this motion, plaintiff lodged with the court a Right to Sue Notice
11 from the EEOC dated September 19, 2006 ("the September 19 Notice"), arising out of Charge No.
12 37A-2006-08360 ("plaintiff's EEOC charge"). Plaintiff's complaint is deemed amended to
13 incorporate this notice. From the face of the notice it is not clear whether plaintiff's EEOC charge
14 was brought against the Union, or whether it was brought only against individual defendants (and
15 therefore not cognizable under the ADA). Plaintiff is ordered to lodge with the court, within 30 days
16 of this order, a copy of the EEOC charge giving rise to the EEOC Notice, setting forth the claims
17 and the parties to be charged. If the document shows that ADA charges were brought against the
18 Union, the court will deem plaintiff's complaint amended to incorporate the document, and at that
19 time determine whether plaintiff has sufficiently pled an ADA claim against any entity defendants.
20 If plaintiff fails to lodge the EEOC document, or if the document shows that it was brought against
21 individuals only, plaintiff's ADA claim will be dismissed. In any case plaintiff's ADA claims
22 against the individual defendants are dismissed.

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24 III. RICO and Hobbs Acts

25 Plaintiff claims that defendants Alvarado, Rhodes and Benson violated the RICO Act, 18
26 U.S.C. Section 1961 et. seq., and the Hobbs Act, 18 U.S.C. Section 1951, by conspiring against him
27 in various ways.

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1 The Hobbs Act states that

2 Whoever in any way or degree obstructs, delays, or affects commerce
3 or the movement of any article or commodity in commerce, by
4 robbery or extortion or attempts or conspires so to do, or commits or
5 threatens physical violence to any person or property in furtherance of
a plan or purpose to do anything in violation of this section shall be
fined under this title or imprisoned not more than twenty years, or
both.

6 18 U.S.C. § 1951(a). The definitions of “robbery” and “extortion” under the Hobbs Act each
7 require that the perpetrator obtain property from another. *Id.* at § 1951(b)(1)–(2). A Hobbs Act
8 violation can serve as the predicate for a civil action under the RICO Act. 18 U.S.C. § 1961(1)(B)
9 (definition of “racketeering activity” includes “any act which is indictable under [18 U.S.C. §
10 1951]”), § 1964(c) (providing civil cause of action for any person injured in his business or property
11 by a violation of the RICO Act).

12 In support of his RICO/Hobbs Act claim, plaintiff alleges several instances of nefarious
13 conduct on the part of various defendants. Plaintiff alleges that Benson directed the Pile Drivers
14 Union to terminate plaintiff from the apprenticeship program, and that Alvarado conspired with
15 Rhodes and other union officials to “throw out Link’s constitutional complaint.” Plaintiff further
16 alleges that Rhodes and Alvarado directed Benson to deny the existence of the alleged oral
17 agreement between the union and KFM. Finally, plaintiff claims that Rhodes tried to physically
18 attack and intimidate plaintiff in retaliation for plaintiff’s criticisms of the union leadership.
19 However, nowhere does plaintiff allege or establish that defendants acquired property from him as a
20 result of these activities. Accordingly, plaintiff has not sufficiently pled a claim under the RICO and
21 Hobbs Acts.

22 In addition to the substantive inadequacies of plaintiff’s RICO/Hobbs Act claim, plaintiff’s
23 original complaint pled nothing with respect to this type of cause of action, and this court’s prior
24 order did not grant leave to file entirely new claims. Plaintiff’s RICO/Hobbs Act claims are
25 therefore independently improper on these grounds.

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1 IV. Civil Rights Violations

2 Finally, plaintiff claims that the entity defendants violated his civil rights in violation of 42
3 U.S.C. Sections 1985(3) and 1986. Plaintiff alleges that the entity defendants conspired to terminate
4 him from the union due to his medical condition, and because of his criticism of union officials. To
5 plead a claim under Section 1985(3), plaintiff must allege:

6 “(1) a conspiracy; (2) for the purpose of depriving, either directly or
7 indirectly, any person or class of persons of the equal protection of the
8 laws, or of equal privileges and immunities under the laws; and (3) an
9 act in furtherance of this conspiracy; (4) whereby a person is either
10 injured in his person or property or deprived of any right or privilege
11 of a citizen of the United States.”

12 Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992). Plaintiff must also plead that the
13 deprivation of his rights was “motivated by some racial, or perhaps otherwise class-based,
14 invidiously discriminatory animus.” Id. (internal quotations omitted). Section 1986 creates liability
15 for the negligent failure to prevent a violation of Section 1985.

16 Plaintiff’s Civil Rights claims arise out of alleged deprivations of his rights to Freedom of
17 Speech and Equal Protection. A cause of action under Section 1985(3) for deprivation of First
18 Amendment rights requires state action, which plaintiff does not (and cannot) establish. United
19 Brotherhood of Carpenters and Joiners of Am. v. Scott, 463 U.S. 825, 831 (1983). A Section
20 1985(3) claim based on denial of Equal Protection may be sustained against private individuals
21 without alleging state action. See Scott v. Ross, 140 F.3d 1275, 1284 (9th Cir. 1998) (“With a few
22 exceptions, claims brought pursuant to § 1985(3) do not require state action”). Accordingly,
23 plaintiff’s Section 1985(3) claim is only sustainable to the extent that plaintiff alleges a conspiracy
24 to deny him Equal Protection—specifically, that the entity defendants conspired to discriminate
25 against him based on his medical condition.

26 Defendants assert that Section 1985(3) does not apply to discrimination based on disability.
27 The court can find no authority in the Ninth Circuit holding that Section 1985(3) applies to
28 discrimination based on disability alone. Moreover, the Sixth Circuit has explicitly held that Section
29 1985(3) does not cover disability-based discrimination. Bartell v. Lohiser, 215 F.3d 550, 559 (6th

1 Cir. 2000); see also Haverstick Enterprises, Inc. v. Fin. Fed. Credit, Inc., 32 F.3d 989, 994 (6th Cir.
2 1994) (holding that “no existing legal precedent supports the plaintiffs’ argument” that Section
3 1985(3) applies to discrimination against the handicapped). In light of this precedent and the fact
4 that disability is not a suspect classification under the Equal Protection clause of the Fourteenth
5 Amendment, the court declines to extend Section 1985(3) liability to disability-based discrimination.
6 See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985)

7 In response to defendants’ argument, plaintiff re-asserts his free speech claim and suggests
8 that union membership alone may satisfy an Equal Protection claim under Section 1985(3). The fact
9 that union members have successfully brought claims under Section 1985(3) for independent Equal
10 Protection violations does not mean that all union members may bring Section 1985(3) claims for
11 any form of discrimination. In addition, as discussed above, plaintiff’s free speech claims cannot be
12 brought against the entity defendants under Section 1985(3) because the entity defendants are not
13 state actors. Plaintiff has therefore failed to plead a cause of action under Section 1985(3).

14 Likewise, liability under Section 1986 for negligent failure to prevent a violation of Section
15 1985 is predicated on a colorable claim under Section 1985. 42 U.S.C. § 1986 (providing that
16 liability “for all damages caused by such wrongful act” will be imposed “if such wrongful act be
17 committed”). Because plaintiff has failed to plead a cause of action under the latter provision, he
18 has failed to plead a cause of action under the former. Accordingly, plaintiff’s claims under Sections
19 1985(3) and 1986 are dismissed.

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21 V. Defendants’ Additional Grounds for Dismissal

22 A. Rules 12(b)(4) and 12(b)(5)

23 Defendants claim that plaintiff’s amended complaint is void for insufficient process and
24 insufficient service of process under Federal Rules of Civil Procedure 12(b)(4) and 12(b)(5),
25 respectively. Defendant’s 12(b)(4) claim appears to be based on the fact that the complaint
26 improperly names the entities as defendants. Defendants assert that plaintiff was not granted leave
27 to add the entity defendants as parties. As discussed above, this court’s previous order implied that
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1 plaintiff could bring claims against non-individual defendants such as the entities named here.

2 Defendants' Rule 12(b)(4) claim is therefore without merit.

3 Defendants further argue that plaintiff's amended complaint should be dismissed under Rule
4 12(b)(5) because plaintiffs failed to properly serve the entity defendants with a summons and a copy
5 of the complaint as required by Rule 4(m). Rule 4(m) provides that defendants must be served
6 within 120 days of the filing of the complaint. Plaintiff's amended complaint was filed on July 5,
7 2006. Plaintiff therefore has until November 2, 2006 to serve the entity plaintiffs, and defendants'
8 present Rule 12(b)(5) argument is premature.

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10 B. Plaintiff's Failure to Meet Deadlines

11 Defendants argue that plaintiff failed to file his amended complaint with 45 days as required
12 by this court's order on defendants' original motion to dismiss, and therefore plaintiff's complaint
13 should be dismissed under Rule 41(b) for failure to comply with a court order. A case-terminating
14 sanction under Rule 41(b) is a "harsh penalty" reserved for "extreme circumstances." Ferdik, 963
15 F.2d at 1260. Plaintiff's filing of his amended complaint two days after the court-imposed deadline
16 (where one day was the July 4th holiday) is not such an extreme circumstance, and the court
17 therefore declines to dismiss the amended complaint on these grounds.

18 Similarly, defendants claim that their motion to dismiss should be considered unopposed
19 because plaintiff filed his opposition one week late. In light of the policy favoring resolution on the
20 merits, the court accepts plaintiff's opposition (and defendant's reply brief). However, plaintiff is
21 admonished that his pro se status does not entitle him to ignore deadlines imposed by the court and
22 by the Local Rules.

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1 CONCLUSION

2 For the reasons stated above, the court GRANTS in part and DENIES in part defendants'
3 motion to dismiss. All of plaintiff's LMRDA, RICO/Hobbs Act, and Civil Rights causes of action
4 are dismissed against all defendants. Plaintiff's ADA claims are dismissed against all individual
5 defendants. Plaintiff is ordered to lodge with the court the document setting forth EEOC Charge No.
6 37A-2006-08360 within 30 days of this order so that the court may determine whether plaintiff's
7 ADA claim has been properly pled against entity defendants.

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9 IT IS SO ORDERED.

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12 Dated: October 24, 2006


13 MARILYN HALL PATEL
14 District Judge
15 United States District Court
16 Northern District of California

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ENDNOTES